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No. 87-730

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTINE MEYER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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1. Respondents argue (Daily Opp. 7-11; Hand Opp. 8-10) that the court of appeals was correct in relying on a presumption of vindictiveness, because the facts of this case suggest that the prosecutor improperly brought the second charge against them.[1] Respondents would confine

[1] Respondents Coleman and Blake take a different tack. They argue (Coleman Opp. 8) that the court of appeals did not presume vindictiveness, but instead found that the government was in fact vindictive because the government failed to offer an independent justification for the enhancement. That assertion is wrong. The district court found that the government acted vindictively, but the court of appeals declined to reach that question. It expressly relied on a presumption that the government acted vindictively. Pet. App. 6a (emphasis added) ("The district court in this case held that the defendants had shown actual vindictiveness, *but we decline to reach this question*. * * * [W]e believe that the defendants presented evidence that would allow a court of appeals at least to find that *a presumption of vindictiveness applied*.").

to its facts this Court's decision in *United States* v. *Goodwin*, 457 U.S. 368 (1982), that a prosecutor's pretrial decision to file additional charges against a defendant is not presumptively unlawful. This Court's decision in *Goodwin*, however, did not reject the use of a presumption of vindictiveness on the ground that the prosecutor in that case did not appear to have been vindictive. Like the court of appeals, respondents have confused a presumption (*i.e.*, a legal rule applicable to a broad range of cases) with an inference (*i.e.*, a conclusion drawn from the facts of a particular case). To say that the presumption of vindictiveness is applicable except when the facts of a particular case show that the prosecutor was not acting vindictively is to say that there is a presumption of vindictiveness with respect to pretrial decisions to add charges, but that it is rebuttable in particular cases. And that is not what *Goodwin* said at all.

Moreover, the approach endorsed by respondents and the court of appeals would permit the courts to invoke a presumption of vindictiveness on the basis of facts that do not even support an inference of vindictiveness (*e.g.*, the prosecutor's decision to dismiss the second charge in order to avoid a jury trial).[2] That approach would permit the courts to find that the prosecutor's decision was vindictive in virtually every case involving multiple defendants, because the facts that the court of appeals found signifi-

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[2] Respondents concur (Coleman Opp. 5; Daily Opp. 16; Hand Opp. 1, 11) in Judge Silberman's conclusion (Pet. App. 35a) that the prosecutor's decision to dismiss the additional charge to avoid a jury trial was "unseemly prosecutorial maneuvering." Neither respondents nor Judge Silberman cite any authority to support the suggestion that such a decision is improper, and we know of none. In fact, *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), and the Court's other decisions involving plea bargaining expressly recognized that the prosecutor may *add* otherwise valid charges in order to persuade the defendant to forgo his right to a jury trial. See also *Goodwin*, 457 U.S. at 378-379 & n.10. It follows that a prosecutor's decision to *drop* charges to avoid a jury trial should be unassailable.

cant (*e.g.*, the fact that respondents faced a more severe sentence than the demonstrators who forfeited collateral) are often the natural consequences of plea bargaining. Finally, that approach permits the courts to engage in arbitrary decisionmaking, because neither the court of appeals nor respondents have offered a principled basis for distinguishing those cases in which a presumption of vindictiveness should apply from those in which a presumption should not be applied.

2. Respondents also maintain (Coleman Opp. 8; Daily Opp. 17-18; Hand Opp. 11, 14-16) that *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), is inapplicable to this case because no plea bargaining took place either before or after the prosecutor filed the second charge.[3] Respondents' argument, however, is premised on the assumption that "plea bargaining" requires the government and the defense to dicker over the terms of a plea agreement in the same way that a buyer and seller in the marketplace haggle over the price of merchandise.

Plea bargaining is the process by which the parties to a criminal prosecution agree on a disposition of the case short of a trial on the merits. Although the "bargaining" ordinarily will involve some form of negotiation between the prosecution and the defense, that is not necessarily true. For example, traffic (and similar) offenses are commonly resolved, simply and efficiently, by allowing the accused to forfeit bail according to a fee schedule set by the particular locality involved. That method of resolving a charge is as much a form of plea bargaining as the type of negotiations that occur in the case of more serious

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[3] Somewhat inconsistently, respondent Daily asserts (Opp. 3) that the prosecutor threatened respondents with incarceration if they refused to forfeit collateral. That assertion is wrong. At the hearing in district court, the prosecutor represented that no such threats had been made. 9/11/85 Tr. 21, *reprinted in* Daily Opp. App. 21a.

charges, such as felonies. The difference is simply that the negotiations between the parties have been eliminated by codifying the terms of the bargain in a rule of court that applies to every case involving a particular charge. That difference is immaterial, however. The lesson of *Bordenkircher* is that the prosecutor may increase the charges against a defendant in order to encourage him to plead guilty. It makes no difference whether the prosecutor's "deal" is conveyed to one defendant or to all, or whether it is devised for one case or for an entire category of cases. In each instance, the defendant is offered the option of disposing of the charge without a trial by bearing a lesser penalty of some sort.

Bordenkircher therefore governs this case. The citations issued to respondents and the other demonstrators stated that a person could forfeit $50 collateral and dispose of the original charge. *E.g.*, C.A. App. 3-39. The hearing notices sent to respondents reiterated that fact. *E.g.*, Letter from the Clerk to Mindy Washington (June 5, 1985), *reprinted in* Washington Opp. App. 12. And if there had been any doubt on that score, the prosecutor made it clear at the hearing in district court that the offer to forfeit the $50 collateral remained open until trial began. Pet. 4; 9/11/85 Tr. 21, 26, 30-31, 33, *reprinted in* Daily Opp. App. 21a, 26a, 30a-31a, 33a.[4] Neither *Bordenkircher* nor

[4] Respondent Daily asserts (Opp. 12 (footnote omitted)) that "once respondents had exercised their election for trial in the district court, the forfeiture of collateral option arguably expired by operation of law," because Local Rule 505(d) of the Rules of the United States District Court for the District of Columbia only authorizes a magistrate to accept payment of a suitable fee in lieu of a trial. That claim (which respondents are making for the first time) is wrong for two reasons. First, the local rule does not forbid a district court from accepting the forfeiture of collateral; it simply authorizes magistrates to do so. Second, if respondents were concerned that the district court could not accept their forfeiture of collateral, they could have asked the court to remand the case to the magistrate for that purpose. No respondent made that request.

any other decision of this Court requires anything more of the prosecution.

3. We explained in our petition (at 14) that the lower court's decision to dismiss the untainted charge against respondents is directly contrary to this Court's decision in *Blackledge* v. *Perry*, 417 U.S. 21, 31 n.8 (1974), where the Court held that a charge untainted by prosecutorial vindictiveness should not be dismissed. Respondents have made no attempt to reconcile the decision below with this Court's decision in *Blackledge*. Coleman Opp. 8; Hand Opp. 18-20; Meyer Opp. 16-20. That alone is sufficient to require the judgment below to be reversed.

We also explained in our petition (at 14-15) that the court of appeals' decision expressly conflicts with the Ninth Circuit's decision in *United States* v. *Hollywood Motor Car Co.*, 646 F.2d 384 (1981), rev'd on other grounds, 458 U.S. 263 (1982), and is inconsistent with the Sixth Circuit's en banc decision in *United States* v. *Andrews*, 633 F.2d 449 (1980), cert. denied, 450 U.S. 927 (1981). Respondent Hand argues (Opp. 19-20) that those decisions are distinguishable. In those cases, she claims, the district court was able to remedy the vindictive conduct by dismissing the tainted charge, whereas in this case that option was not available, since the government had already dismissed the tainted charge on its own motion. That distinction is immaterial. Neither the Ninth nor the Sixth Circuit would authorize a district court to dismiss an untainted charge. The Sixth Circuit endorsed this Court's decision in *Blackledge* v. *Perry, supra*, in discussing the appropriate remedy for prosecutorial vindictiveness (*Andrews*, 633 F.2d at 455, citing *Perry*), and the Ninth Circuit in *Hollywood Motor Car* rejected the precise rationale given by the District of Columbia Circuit in this case for dismissing the untainted charge (*Hollywood Motor Car*, 646 F.2d at 388-389). The distinction that respondent Hand proposes makes sense only on the assumption that

a district court must be able to punish the government in some way for engaging in misconduct even if the defendant is not prejudiced by the misconduct. This Court rejected that argument in *United States* v. *Morrison*, 449 U.S. 361 (1981), however, and respondents have offered no persuasive reason why a different rule should be applied here.

4. Respondent Coleman erroneously contends (Opp. 12) that "[t]he ruling in this case is wholly fact-bound" and "responds to a situation unlikely to recur in the District of Columbia" or elsewhere. In fact, the Court has pending before it a petition seeking review of a decision of the District of Columbia Court of Appeals stemming from a different demonstration, in which that court rejected a claim of prosecutorial vindictiveness arising from similar facts. *Shiel* v. *United States*, 515 A.2d 405 (D.C. 1986), petition for cert. pending, No. 87-6017.[5] Nor is *Shiel* the only other case in which this sequence of events is likely to occur. Mass demonstrations are a commonplace occurrence in the District of Columbia. Because a prosecutor may decide to bring an additional charge against demonstrators who choose to stand trial in any such case, the facts giving rise to respondents' claim of vindictiveness are likely to recur with regularity.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

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[5] We have provided respondents with a copy of our response to the petition in the *Shiel* case.

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